

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: : 15-10368 (SHL)
HS 45 JOHN LLC, : One Bowling Green
Debtor. : New York, New York
: June 27, 2016

TRANSCRIPT OF HEARING ON (188) MOTION TO AUTHORIZE
TERMINATION OF THE CELL TOWER LEASE, OR ALTERNATIVELY,
REJECTING THE CELL TOWER LEASE
BEFORE THE HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtor: J. TED DONOVAN, ESQ.
Goldberg Weprin Finkel Goldstein LLP
1501 Broadway, 22nd Floor
New York, New York 10036

For AT&T: DAVID A. ROSENZWEIG, ESQ.
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New York, New York 10103

For the Purchaser: ALLAN R. FREEDMAN, ESQ.
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1 (Proceedings began at 10:33 a.m.)

2 THE COURT: The next matter is HS 45 John LLC.

3 Good morning. Let me get appearances starting on this side of
4 the room working that way.

5 MR. ROSENZWEIG: Sure. Good morning. David
6 Rosenzweig; Norton Rose Fulbright for AT&T.

7 MR. DONOVAN: Ted Donovan; Goldberg Weprin Finkel
8 Goldstein for the debtor, HS 45 John.

9 MR. FREEDMAN: Allan Freedman on behalf of the
10 purchaser.

11 THE COURT: All right. So I looked the papers that I
12 got and people don't need to repeat what's in the papers, but I
13 want to make sure I'm understanding a few things. If I'm
14 understanding correctly, there doesn't seem to be any dispute
15 that there was no notice of this sale, the free and clear sale,
16 to the movant here. That doesn't seem to be a disputed fact,
17 meaning written notice of the motion.

18 MR. ROSENZWEIG: I think that's undisputed, yes.

19 THE COURT: All right. So --

20 MR. DONOVAN: Your Honor?

21 THE COURT: Yes.

22 MR. DONOVAN: There was no specific written notice
23 given. They did not appear in the affidavit of service that
24 was filed. There are some open questions about whether and
25 when AT&T became aware that there was a bankruptcy. They had

1 contacted our office shortly after the contract was signed in
2 the fall before we filed in February to get access to the
3 property. They contacted us several times during the
4 bankruptcy to get access. And we believe as a result of those
5 conversations they were made aware that there was a bankruptcy.
6 There's no specific testimony on it and they certainly did not
7 get formal notice of the sale.

8 THE COURT: Right.

9 MR. DONOVAN: Or a confirmation letter.

10 THE COURT: Well, the papers I got in opposition are
11 pretty thin, so I was looking around. I saw there was
12 something saying what they knew, what they didn't know. No
13 one's really made a full blown constructive notice argument to
14 me. I don't want to over think this but, you know, notice
15 issues are a big deal. You know, you can look at Judge
16 Gerber's decision in GM dealing with plan notice issues even
17 when other parties raised exactly the same arguments. Notice
18 is a big deal. So it's my starting point to say how can I
19 apply the free and clear order to the movants here if they
20 didn't have notice of the sale?

21 MR. ROSENZWEIG: Your Honor, that's really -- what
22 counsel is doing is turning it on its head. One of AT&T's
23 counsel was in contact with them and they still didn't give any
24 notice. So there's no -- they put in no evidence that they
25 told AT&T about the bankruptcy. And in fact, that contact is

1 exactly why they should have put us on the notice list so we
2 could show up. We're a known party so we're entitled to actual
3 service, not sort of just publication or anything else.

4 THE COURT: I don't know who's lying in the weeds and
5 who's not in cases like this. I only know what I see. So if
6 somebody wants to make a constructive notice argument, they
7 have to give me the facts and they have to give me the law, and
8 I don't have either. So it's an adversary system for a reason
9 and I'm not a UN commission who's going to go on a fact finding
10 mission and go to people's offices and find out who was talking
11 and who went and looked at telephone logs. I rely on what
12 people give me. So I don't have a constructive notice
13 argument. No one's given me facts and the law to say why the
14 fact that the sale motion wasn't served on the movants is not a
15 problem.

16 MR. FREEDMAN: I would like to agree with AT&T's
17 counsel who on the second page says should the party be
18 entitled to a better outcome from the sale solely because the
19 debtor did not give notice of the existence of the property.
20 And I would suggest to Your Honor that in a case like this
21 where we're talking about a lease for about \$20,000 a year the
22 sale of a property, which Your Honor knows sold for about \$70
23 million, it's very much a case of the tail wagging the dog. If
24 the matter had been brought up during the course of the
25 bankruptcy, what AT&T could do is file an objection to their

1 rejection of the lease, file something that says it's cost us
2 so much money and therefore let us get paid by the debtor. The
3 debtor has made that motion to reject the lease. It said we
4 haven't been paid for 20 months or whatever. AT&T put in some
5 documents that show they paid somebody, but who this somebody
6 is there's no explanation.

7 THE COURT: Well, I can't blame -- I don't know who
8 to blame and frankly, I don't think I'll ever be able to figure
9 it out as to what the confusion was before everything happened.
10 There was a colorful cast of folks here in the courtroom in
11 this case and communication was not high on the list. To give
12 debtor's counsel credit, they basically had to wrestle this
13 case to the floor to get it to go forward. So any money that
14 was paid, who knows? I'm sure you could as a forensic
15 accountant figure it out, somebody could figure it out. But I
16 don't know what to make of that. Frankly, I don't make
17 anything of it. It is what it is. I don't know if some of the
18 folks who had judgments entered against them ended up with
19 money in their pockets. I have no idea.

20 But my problem is that they could have done a lot of
21 things but they didn't get notice and nobody -- again, you've
22 got to make arguments and give me something to work with here
23 because I can't even figure out what people are saying sort of
24 on this side about what the debtor can do or can't do because
25 at the one point I'm hearing debtors are not responsible

1 because they're not a party to the lease. But on the other
2 hand, they're trying to reject the lease. And so I know they
3 were a contract vendee and I know the settlement was premised
4 upon their ability to sell the property. So it's a mess, but
5 nobody's given me anything. So I don't know what you want me
6 to do with this. This does seem to be the tail wagging the dog
7 but it also seems clear that people are not cooperating with
8 each other. And I don't have any illusions that I never know.
9 I may think I know, but I don't know. And so I'm the option of
10 last resort. So if people can work it out, it does seem to be
11 a fairly modest issue that we've spent a lot more time on
12 attorneys fees than it's worth. But I guess what you want me
13 to do is grant the motion to reject the lease but the debtor is
14 I think a party to the lease and therefore doesn't have any
15 obligation. So I don't know who's rejecting what and I don't
16 have any authority dealing with it, so --

17 MR. ROSENZWEIG: Your Honor, just to put some
18 context, I know that counsel wants to make this into the tail
19 wagging the dog, but it's an important issue for a telecom
20 carrier to have the sale --

21 THE COURT: Well, you have whatever legal rights you
22 have.

23 MR. ROSENZWEIG: But my point is it's not just well
24 it's only this amount of rent or whatever. It goes in and out
25 and that affects our business.

1 THE COURT: I know, but there are many buildings in
2 Manhattan. I'm sure that this is not the only place you can
3 put a cell tower.

4 MR. ROSENZWEIG: Yeah, and it costs money to move it.
5 So yeah, there's a bigger -- there are bigger issues here. Our
6 --

7 THE COURT: Well, all I'm saying is if somebody --
8 money talks. So if somebody wants to write you a check large
9 enough to say here is what it's going to cost to move your
10 tower and to compensate people and that's essentially we'll
11 treat it like rejection damages whether or not the debtor is a
12 party to the lease or not, just like we sold it, whether it was
13 unclear whether the debtor was the vendee in possession or
14 whatever it was, we just sort of said you get it done. So if
15 somebody wants to do that because it's worth it to you having
16 bought the building and you can work with debtor with the money
17 you got existing, I mean fine. But you know, I'm not the
18 negotiating party. It seems to me that there's probably a
19 price point somewhere that everybody can live with and hold
20 their nose and go away but --

21 MR. FREEDMAN: Your Honor, we had a meeting in order
22 to do exactly what Your Honor suggested. AT&T was supposed to
23 get back to us with the results of their survey, how much it's
24 going to cost, what they need to do, what they have to do, who
25 has to do what. They never got back to us. They never said a

1 word about it.

2 MR. ROSENZWEIG: Your Honor --

3 MR. FREEDMAN: What we haven't had in the time that
4 we've owned the building, okay, we've owned the building since
5 the beginning of this year, and we haven't had a nickel of
6 rent. AT&T comes up with to me a very new kind of argument.
7 They say a footnote on the last page of their brief that they
8 haven't paid any rent and the reason they haven't paid it is
9 because there have been discussions to resolve it and the
10 purchaser refused to acknowledge it, and the purchaser denied
11 access. But there's no question that the purchaser gave
12 access. They denied some access.

13 THE COURT: Well, people came in here because there
14 was a fight about access.

15 MR. FREEDMAN: Right.

16 THE COURT: So --

17 MR. FREEDMAN: And then they got it.

18 MR. ROSENZWEIG: It's still --

19 MR. FREEDMAN: And then they got it.

20 THE COURT: All right.

21 MR. ROSENZWEIG: Look, Your Honor, we --

22 MR. FREEDMAN: And we haven't had a nickel of rent --

23 THE COURT: All right, all right.

24 MR. FREEDMAN: I'm sorry, Your Honor.

25 THE COURT: Don't talk over each other. All right?

1 This is among the dumber disputes I've had to preside over in
2 quite a while. And the papers are lousy. So you're not
3 helping yourself. If you want some relief, you've got to write
4 better papers than this.

5 So here's what I'm going to do. You're going to
6 figure out -- there's money going one way or the other here.
7 Either you've got to pay rent which you haven't paid or you've
8 got to pay them to go away. And I don't know if there's some
9 money available in escrow and then there's obviously other
10 money. If it's a value for you, an important value for you
11 that you want them off there, then you're going to have to pay
12 for it. So that seems to be the swing unless I'm totally
13 misreading this.

14 MR. ROSENZWEIG: No. Economically that's an issue
15 but that means move. We'd rather not move. We'd rather keep
16 it on the building and --

17 THE COURT: I know, but do you really want to have a
18 trial on constructive notice? I mean we're going to drag
19 witnesses in here and say what did you know, when did you -- I
20 mean there are in the cases that you cited, you know, there are
21 not -- these are one of these cases that would be a wonderful
22 law school exam to torment young lawyers with and spend a lot
23 of time and a lot of money. And there's a couple of things in
24 the cases. One is about constructive notice. I don't know who
25 knew what when, who sat on what rights or didn't. The argument

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1 is it's certainly not fully developed. But then there's also a
2 line of cases about rights of parties whose interests have been
3 compromised where the rights are unclear and whether you're
4 supposed to give notice and how that works. So there's a lot
5 of interesting things here. I don't know how important it is
6 for AT&T to be in this particular building. I don't know how
7 important it is for you to get rid of. But there's money going
8 one way or the other that you should be able to quantify.

9 MR. ROSENZWEIG: That may be and it's significantly
10 more than this escrow, okay? Significantly. That I know.
11 Exactly how much, I don't have a number on that. That's just -
12 - now we've had meetings, we've had discussions, and we simply
13 are told basically --

14 THE COURT: Well, I don't want to get into what
15 people are told.

16 MR. ROSENZWEIG: I know, but you're sending us back
17 to --

18 THE COURT: What I -- no, I'm not going to send
19 anybody anywhere. What I'm going to do is I'm going to leave
20 the bench. I'm going to ask both of you to write down a number
21 on a piece of paper, at least a ballpark figure as to what is
22 going to take -- I mean how much rent is owed and what it's
23 going to take to get you off the building. So I can't imagine
24 AT&T has a particular affection for this building such that
25 it's about that. I understand your frustration. You didn't

1 get notice, you're supposed to get notice of the sale. I
2 understand that. What I'm trying to do is find a way that
3 respects the sale order in a case that was a --

4 MR. ROSENZWEIG: And we're not trying to upset the
5 sale order but --

6 THE COURT: Well, you have to. I understand that.

7 MR. ROSENZWEIG: But as to us, yeah. And my point is
8 if we had gotten notice we would have shown up and raised the
9 arguments about 365(h), 363(f), how it couldn't be done anyway,
10 so --

11 THE COURT: I know, but we all know how it would have
12 worked out. You would have found a way to get compensated to
13 get off the building if the purchaser was only going to buy it
14 to get you off the building. That's the way it would have
15 worked out. But that means somebody has got to pay you now to
16 get off the building. So that's the way it works. So I don't
17 know what the number was then, I don't know what the number is
18 now. I don't want to know. But I mean that's how it would
19 have worked because if the purchaser said I'm going to buy it
20 but I'm not buying it with it on it, then I suspect something
21 would have happened short of no sale because without the sale
22 there would have been no case.

23 MR. DONOVAN: From our perspective, we had those
24 conversations with the purchaser before the closing. We put
25 \$25,000 in escrow which we're holding. That's the money that's

1 there.

2 THE COURT: Yes, but you know what? They don't have
3 to take that. There was no notice given. There's --

4 MR. DONOVAN: There was an escrow agreement, Your
5 Honor. They don't have to take it but our agreement with the
6 purchaser is --

7 THE COURT: No, I understand that, I understand that.
8 That was the debtors walkaway amount and say after this it's no
9 longer our problem. I understand that. I don't know why they
10 weren't noticed. It doesn't really matter. So if you want to
11 get them off you're going to have to pay them. You would have
12 had to pay them before. So do you want a time to talk now or
13 do you want me to just take a few minutes and rule? It's up to
14 you.

15 MR. ROSENZWEIG: Your Honor, we --

16 MR. FREEDMAN: I'm sorry --

17 MR. ROSENZWEIG: Go ahead.

18 MR. FREEDMAN: We are presently in a situation where
19 we own the building and we haven't been paid rent now. And I
20 think in the courts of the State of New York we are entitled to
21 have them evicted for nonpayment of rent. None of that I think
22 is really before Your Honor.

23 THE COURT: But if they pay you, they're not going
24 anywhere, right? So that's obvious, you want them off I
25 thought. If it's just a matter of payment, I'll direct that he

1 pay you in three business days or less.

2 MR. ROSENZWEIG: Your Honor, we were happy to pay
3 them but there was a lot of confusion.

4 THE COURT: I didn't think that's what this was
5 about.

6 MR. ROSENZWEIG: I think it's just sort of being used
7 as --

8 THE COURT: Well again, you know --

9 MR. ROSENZWEIG: -- an excuse here.

10 THE COURT: So here's what I'm going to do. I'm
11 going to leave the bench for 15 minutes. I'm going to come
12 back. If you reach some sort of resolution or you want time to
13 talk, great. If not, I'm just making a ruling. So there's
14 problems here on both sides and I'll do the best I can with
15 what I've got. And you know, it's not pretty what we do
16 sometimes. We're here to break ties and that's my job. This
17 doesn't seem to be the right way to do it but I'll do the best
18 I can with what I got. And so what I would ask is just knock
19 on the door when you're done chatting and I'll come out and if
20 there is no agreement I'll just make a ruling unless there's
21 something, other matter of law that somebody wants. I realize
22 I've been trying to sort of find an alternative solution. Is
23 there anything as a legal matter anybody wants to say before I
24 sort of take it under submission and leave the bench?

25 MR. ROSENZWEIG: No. I think we put it all in the

1 papers.

2 THE COURT: All right. Anything from this side?

3 MR. FREEDMAN: It's all in our papers.

4 THE COURT: All right. Anything from the debtor?

5 MR. DONOVAN: No.

6 THE COURT: You're in for 25 and after that you're
7 out. All right. Just knock on the door when you're done
8 chatting. Thank you.

9 MR. FREEDMAN: Thank you, Your Honor.

10 (Off the record at 11:27 a.m.)

11 THE CLERK: All rise.

12 THE COURT: Please be seated. All right. Unless
13 there's some sort of resolution, I'll read a ruling into the
14 record. Is there any resolution?

15 MR. ROSENZWEIG: Your Honor, no, we were not able to
16 reach a resolution.

17 THE COURT: All right. Before I do that, I just want
18 to clarify something with debtor's counsel and anybody else can
19 chime in if they disagree or you want to be heard on this
20 issue.

21 I'm understanding the debtor's responsibility is
22 limited to the \$25,000 by virtue of the escrow. That is the
23 only liability the debtor can have in connection with any of
24 this.

25 MR. DONOVAN: That is correct, Your Honor. Since we

1 weren't a party to the lease, since we never owned the
2 property, we don't believe we have any liability directly with
3 AT&T and we have an escrow agreement with the buyer.

4 THE COURT: All right. And the debtor has no claim -
5 -

6 MR. DONOVAN: And I checked Friday. We do have the
7 25,000 in a separate escrow account.

8 THE COURT: All right. And the debtor has no claim
9 for nonpayment as to any of this meaning in the estate.

10 MR. DONOVAN: No. We did have a dispute with Miller
11 and Sprei and that all got settled. So as to the pre-
12 bankruptcy payments, all that's been resolved. So we didn't
13 have a claim against anybody else.

14 THE COURT: So you don't have a claim against AT&T.

15 MR. DONOVAN: No.

16 THE COURT: All right.

17 MR. DONOVAN: Because anything we have they would
18 have by virtue of being the -- of they being the purchaser
19 would have by virtue of being the purchaser.

20 THE COURT: Right. All right.

21 So I have a few motions before the Court that deal
22 with the sale of the property that was the centerpiece of this
23 case. It was sold for some \$70 million. One deals with AT&T
24 that has a tower that it has on the building by virtue of an
25 agreement that predates the debtor. And the other is a request

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1 by the debtor, a motion dealing with trying to reject that
2 lease. And all this centers on notice and things that we've
3 been discussing. So let me table set first.

4 No one is asking that the sale of the property be
5 rescinded, and that's a good thing because sales in bankruptcy
6 are to be respected and only voided under exceedingly limited
7 circumstances. See Dishi & Sons v. Bay Condos, 510 BR 696.
8 Bankruptcy, southern -- well, it's not bankruptcy. (SDNY
9 2014). And in that case Judge Oetken, the district judge,
10 noted the Second Circuit's view that the debtors can sell
11 property free and clear of leasehold interest pursuant to
12 Section 365(f), something he notes is the minority view
13 actually out there.

14 But with all that said then the only question is the
15 status of AT&T's lease for the cell tower on the roof.

16 Also important in terms of level setting here is the
17 involvement or obligations of the debtor in the current
18 dispute. The debtor's exposure is limited only to \$25,000
19 that's already placed in escrow by virtue of an agreement
20 between the debtor and the purchaser, 45 John NY LLC. The
21 debtor has no other potential liability nor does the debtor
22 have a claim against AT&T for nonpayment prior to the sale. So
23 the debtor's involvement is just limited to the \$25,000.

24 So based on the record before the Court, the Court
25 concludes that the building was not sold free and clear of this

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1 lease. That's because there was no dispute that AT&T was not
2 given notice of the sale motion, was not a noticed party. And
3 there's plenty of case law about the relevance and importance
4 of notice in this context.

5 The Court notes that there was possibly a
6 constructive notice argument floating around in this case that
7 might exist. Frankly, I don't know. The papers imply that
8 AT&T knew of the bankruptcy but that's not the same as saying
9 it knew of sale which is the relevant issue. In any event, no
10 evidence has presented to me sufficient to make out a
11 constructive notice argument and no law was presented to me to
12 do the same.

13 So as to the motion to reject the lease, the basis
14 for that motion was nonpayment. Evidence was presented to me,
15 however, that in fact payments were made. Moreover, the debtor
16 concedes the lease was not and is not with the debtor but with
17 the party that predates Messrs. Miller and Sprei in this case.
18 So it's not all that surprising that debtors may or may not
19 know whether payments had been made. Indeed, anyone who spent
20 any time in this case knows there was a massive amount of
21 confusion surrounding the affairs of Mr. Miller and Sprei as to
22 this property and other matters in this case and a huge amount
23 of resulting litigation. We can just add this lease as one
24 more to the body count of that confusion.

25 But given all these facts, the Court does not have a

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1 basis at the moment to grant the motion to reject the lease and
2 will deny it without prejudice based on what I have.

3 So that leaves one issue which is what appears to be
4 the lack of, undisputed lack of payments by AT&T on the lease
5 since the sale to the purchaser, 45 John NY LLC. That issue
6 does not concern the debtor's estate given the debtor's lack of
7 any further liability relating to this lease or any claims that
8 the debtors might have arising under this lease. So what you
9 have is a dispute between two parties that really has nothing
10 to do with this bankruptcy at this juncture.

11 So AT&T, 45 John New York LLC both have whatever
12 rights they have on the issue of nonpayment to deal with
13 outside of the bankruptcy court. And that's my ruling.

14 I'd ask that the parties work together to submit a
15 proposed order. The order shouldn't spend too much time
16 explaining the rationale. You can just say for reasons stated
17 on the record at the hearing today. And that's my ruling. So
18 that would deal with both the lease motion as well as AT&T's
19 motion.

20 MR. ROSENZWEIG: Thank you, Your Honor.

21 MR. FREEDMAN: Thank you, Your Honor.

22 MR. DONOVAN: Thank you, Your Honor.

23 THE COURT: All right. Thank you. Sort of a classic
24 split decision. All I can say is I urge the parties to try to
25 resolve it without engaging in further litigation. It doesn't

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1 seem to be worth it but, you know, there may be more going on
2 here than I know of. And in that case, good luck with your
3 efforts. Thank you.

4 MR. ROSENZWEIG: Thank you, Your Honor.

5 MR. FREEDMAN: Have a good day, Judge, and thank you
6 again for --

7 (Proceedings concluded at 11:35 a.m.)

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1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.



6 _____
Mary Greco

7 Dated: July 28, 2016

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